



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

SUCCESSION CAUSE NO.99 OF 2017

(FORMERLY NKU.442/2017)

IN THE MATTER OF THE ESTATE OF MUCHEMI NDIRANGU MUTUNGI (DECEASED)

A N D

EVANSON WAGAKO MUCHEMI.....1ST PETITIONER

SAMUEL KIANDUMA MUCHEMI.....2ND PETITIONER

V E R S U S

CHARLES MUGERA MUCHEMI.....1ST OBJECTOR

SIMON KAMWAMBA MUCHEMI.....2ND OBJECTOR

DAVID WAGAKO MUCHEMI.....3RD OBJECTOR

JUDGMENT

Muchemi Ndirangu Mutungi (hereinafter referred to as the deceased) died of cancer on 10/2/2012 at Mumui, Nyandarua South.

He was aged 92 years.

The deceased was survived by three houses whose members are as follows:

1st house:

- 1. Susan Kabui Irungu - widow**
- 2. Samuel Kianduma Muchemi - son**
- 3. Charles Mugeru Muchemi - son**
- 4. Evanson Wagako Muchemi - son**
- 5. Esther Wanjira - daughter**
- 6. Isabella Wairimu - daughter**
- 7. Gladys Mihuiku - daughter**

2nd house:

1. Mary Wanjiru Muchemi - widow
2. Paul Maina Muchemi - son
3. Simon Kemwambe Muchemi - son
4. Hannah Wambui Muchemi - daughter
5. Monicah Wandia - daughter

3rd house:

1. James Ndungu Muchemi - son
2. Stepehn Tom Muchemi - son
3. David Wagako - son
4. Francis Mwangi - son
5. Zachary Mainye Muchemi - son
6. Jecinta Wanjira - daughter
7. Milka Wambui - daughter
8. Mary Wairimu - daughter

The 1st house comprised the wife, 3 sons and 4 daughters, 2nd house - 2 sons and 3 daughters, 3rd house – 5 sons and 3 daughters.

Evanson Wagako Muchemi and **Samuel Kianduma** petitioned this court for probate of written Will on 27/6/2012. Grant of probate of written Will was issued on 2/11/2012. On 11/12/2012, the objectors **Charles Njuguna**, **Simon Kamwamba** and **David Wagako** filed a summons for revocation of grant under Section 68 and 76 of the Law of Succession Act.

The objectors seek the following orders:

- (a)spent;
- (b) *That the petitioners be restrained from administering the deceased's estate pending determination of this application;*
- (c) *That the grant of letters of administration to Evanson Wagako and Samuel Kianduma Muchemi on 2/11/2012 be revoked or annulled on grounds that the grant was obtained fraudulently by the concealment from the court of something material to the case and that the proceedings to obtain the grant were defective in substance;*
- (d) *That the court do order that an estate account be opened jointly by the petitioners and objectors and all rents collected from the estate be deposited therein;*
- (e) *That the objectors be allowed to file a notice of objection and answer to petition and cross petition to the petition out of time;*
- (f) *Costs of the application.*

The objectors filed a petition by way of cross petition for grant on 15/8/2013.

Thereafter directions were taken on 15/5/2014 that the objection proceedings do proceed by way of viva voce evidence and the petitioner's case was to start. The first witness to be called was **Paul Njihia Njoroje (PW1)**, an advocate of the High Court based at Engineer. He told the court that the deceased approached him in September, 2011 with instructions to prepare his Will; that the deceased had photocopy of identity cards; that he prepared the Will and on 31/12/2011 he met the deceased in his office at Ndunyu Njeru Township where the Will was executed by the testator appending his signature; his witnesses, **Humphrey Huruko** appended a signature while **Kinyua Mutungi** put his thumb print and that he signed the Will and affixed his stamp.

PW1 told the court that though fairly elderly, the deceased was mentally alert, physically and did not look frail. PW1 was later summoned by the chief at the D.O.'s office Kipipiri in Mid March, 2012 where he met the deceased's son.

PW2 Humphrey Huruko Njau was an old friend of the deceased since 1980's. He testified that the deceased called him on 31/11/2011 as

his farm was near deceased's office at Ndunyu Njeru. He found an advocate and one, Kinyua and the deceased asked him to sign his Will. He recognized his signature in the Will produced as P.Exh.1. PW2 said that the deceased had informed him earlier that he was preparing his Will and wanted him to attest but did not know the contents of the Will. He said that it is the deceased who introduced him to the advocate and the other old man. PW2 said that the deceased used to be brought to Ndunyu Njeru by vehicle as he was not able to walk. He confirmed that before signing the Will, he had given a copy of his identity card to the deceased.

PW3 Evanson Wagako, the 1st petitioner testified that the deceased was his father and had three wives and 19 children in total; that the deceased had pieces of land in Nyandarua, Kipipiri, Kinangop and Nyeri; that in Kinangop, he had 206 acres, that is, Nyandarua/Mumui 590 and 595 measuring 206 acres; in Nyeri he had 4½ acres; that in 2007 the deceased distributed his land to his 10 sons with each getting 10 acres of land; that at the burial, the chief announced that there was a Will at his office and she would call the family to her office in two weeks; they were invited to the chief's office after a month where they found the D.O, Area Chief, Advocate who prepared the Will and the Will was read to them and a copy given to them.

The advocate told them to go to his office if anybody had questions. He did not understand the Will and they went to the advocate's office and he explained it to him; that the Will had distributed the balance of 106 acres and each house got its share; that they are using the land in accordance with the Will and that the objectors are also using their portions. PW3 said that when one goes to the ground, he will understand what the Will means because there is a fence and river subdividing the land. He urged the court to respect the deceased's wishes by adhering to the deceased's Will. PW3 admitted that the mother, who was the first wife was the one taking care of the deceased just before his death as the 2nd wife was blind, whereas the 3rd wife had died. It is PW3 who used to drive the deceased. He denied that the deceased was not able to walk. He denied having had a hand in his appointment as an executor of deceased's Will or having influenced the distribution of the estate as per the Will.

According to PW3, daughters have not been disinherited because they will get a share of the estate from what each house was given. He admitted that whereas the 1st house was given commercial plots with freehold titles, the 2nd and 3rd houses were given plots with expired titles. He said that the deceased was unable to leave the house only 3 – 4 days before his death.

Objector's case:

Simon Kamwamba Muchemi, (DW1) one of the objectors opposed the Will because it is skewed in favour of the 1st house who have got 64% of the estate, 2nd house 8% and 3rd house 28%; that the two executors belong to the first house whilst the objectors are from all the houses – Charles Mugeru from 1st house, Simon from 2nd house and David Wagako from 3rd house. He recalled that he last saw the deceased on 24/12/201 in his sitting room when very sick and weak and was surviving on water and porridge; that the deceased had declined to go to hospital since 1953; that the Will favoured the first house because two prime plots on freehold bringing in substantial rents of about KShs.60,000/= went to the 1st house, that plots Nyandarua/Nyandarua/916 and 917 went to sons of the 1st house; that the 2nd house was given plot Nyandarua/Ndunyu Njeru/270 co-owned by one Kebunyu Kiragu and that the rent collected is KShs.6,000/= per month.

That the 3rd house was given Nyandarua/Ndunyu Njeru/170 which is dilapidated and has no income and plot 249 whose income in rent is KShs.6,000/= per month. Market stalls to 3rd house bringing KShs.9,000/= and that all the these leases to the plots are expired leases. He said that they did searches on the properties and found their leases to have expired; that all the cash in the bank, shares in a Limited Liability Company and motor vehicle were left to first house but his ailing mother who was blind was left without a cent. He also complained that the Nyeri land which has tea, coffee and exotic trees was left to the 1st wife while the parent's house which should have left to the parents and grandchildren in accordance to Kikuyu custom was left to the 1st petitioner; that daughters of the 1st house were given property but not those of 2nd and 3rd house; that grandchildren of 1st house were given something but not for 2nd and 3rd house. DW1 confirmed that PW3 used to drive the deceased around and the 1st wife was very close to the deceased and cared for him – cooking and bathing him; that the 2nd petitioner was also very close to deceased and so was the grandchild Joseph Muchemi.

He further stated that the deceased was illiterate and the Will is not witnessed or paginated and that the thumb print is only on the 3rd page but not on 1st and 2nd page; that some clauses are contradictory e.g. 1 and 17. He also complained that the deceased's two sons, Stephen and David had been omitted from the Will. He admitted that each house is using the land in accordance with the Will.

DW2 James Ndung'u Muchemi, deceased's son from the 3rd house told the court that on 31/12/2011 on a Saturday, his father called him to his house about 10.00 a.m. that the deceased informed him that Evanson Wakago and Joseph Kianduma had taken photographs of him and made his thumb print papers; that he called Francis Mwangi to come and listen to what the deceased had to say and that the deceased repeated to him what he had said; that the father not well and that he made a note of what the deceased said in his diary which was produced in court as a D.Ex.No.1(a) with the translation as (b). He admitted that he had taken 6 years to mention the said conversation because he had been sick and had forgotten about it.

DW2 was unable to explain the overwriting on the date of 31/12/2011 in his notebook. He said he reported to the District Officer and Chief about what the father had said to him after the Will was read, but never reported to the police.

I have considered the evidence on record and the rival submissions filed herein on 19/7/2018 by the petitioners and those of the objectors, filed in court on 27/9/2018. Having reviewed both the evidence and submissions, I think that the issues that need consideration are:

(1) Whether the deceased left behind a valid Will;

(2) If so, whether the estate should be administered in accordance with the Will;

(3) Whether the grant issued to the petitioners herein on 2/11/2012 should be revoked or annulled on grounds of

concealment of material facts from the court or that it was obtained fraudulently or is defective;

(4) Whether some dependants were left out of the Will, and if so what is their remedy;

(5) Who bears the costs.

Section 11 of the Law of Succession Act provides for what constitutes a valid Will.

The Section reads as follows:

“No written Will shall be valid unless:

(a) The testator has signed or affixed his mark to the will, or it has been signed by some other person in the presence and by the direction of the testator;

(b) The signature or mark of the testator, or the signature of the person signing for him, is so placed that it shall appear that it was intended thereby to give effect to the writing as a will;

(c) The will is attested by two or more competent witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will, in the presence and by the direction of the testator, or have received from the testator a personal acknowledgement of his signature or mark, or of the signature of that other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

The Will produced by PW1 has the thumbprint of the deceased. No contrary evidence was adduced to prove that it was not the deceased's. The Will was witnessed by PW1 and two other witnesses. Humphrey Huruko (PW2) confirmed that he signed the Will and so did Kinyua Mutungi whom PW3 identified as their relative.

PW1 also testified that the Will was attested by the deceased in his presence and the other witnesses. PW2 told the court that he signed the Will in the presence of the deceased. It was not necessary that more than one witness be present at the same time.

The objectors have challenged the Will for reasons that the deceased was old, sick and frail, that he could not have left his home to go and prepare the Will. DW2 testified that the deceased never left the home on 31/12/2011 because he was with the deceased at the deceased's house that day. He produced a notebook in which he recorded their meeting how the deceased informed him how the petitioners had taken photographs of him and his thumb print.

However, though the objectors had challenged the authenticity of the Will, it took DW2 six years to disclose what the deceased had told him. DW2 blamed this on his condition of being sickly. He then went on to tell the court that he did not tell DW1 about it in 2016 when DW1 filed his statement in court because he had forgotten what the deceased told him. How could DW2 forget such an important issue and what prompted him to remember? Then in his diary in which he purportedly made a record of what the deceased told him, the record comes after a record of 18/2/2018 and the notebook had no records of 2012, 2013, 2014 and 2015. DW2 could not explain the absence or lack of any entries in those years.

DW2 was put at pains to explain why there was overwriting on the date of 31/12/2011. It is obvious that another date had been written thereunder and one cannot tell the date that was written under.

The only conclusion that this court can arrive at is that the entry in the notebook is a total fabrication and it was made by the objectors to arm-twist the court. DW2's testimony on the diary is also untruthful. DW2 could not explain why he never disclosed the contents of the diary for so long.

Although the objectors alleged that the deceased was so sick and frail that he could not have left his home, the objectors have not adduced any evidence in support thereof, for example, medical evidence.

DW1 in his testimony suggested that the Will was a forgery in that it was not thumb printed or signed on each page. However, PW1, the author of the said Will was in court and the objectors never challenged the authenticity of the Will by putting to him questions as to why all the pages were not signed.

Section 5 of the Laws of Succession Act provides for who has the capacity to make a Will. The Section provides as follows:

(1) Subject to the provisions of this Part and Part III, every person who is of sound mind and not a minor may dispose of all or any of his free property by will, and may thereby make any disposition by reference to any secular or religious law that he chooses;

(2) A female person, whether married or unmarried, has the same capacity to make a will as does a male person;

(3) Any person making or purporting to make a will shall be deemed to be of sound mind for the purpose of this section unless he is at the time of executing the will, in such a state of mind, whether arising from mental or physical illness, drunkenness, or from any other cause, as not to know what he is doing;

(4) The burden of proof that a testator was, at the time he made any will, not of sound mind, shall be upon the person who so alleges.

So far the objectors did not satisfy the court that the deceased lacked capacity to make a Will.

Section 7 of the Laws of Succession Act declares as void any Will that has been made through fraud or coercion. There was no attempt made by the objectors to prove fraud.

Having dismissed the evidence of DW2 as a total fabrication, I do believe that PW1 and PW2 were truthful witnesses. They were present at the office of the deceased at Ndunyu Njeru when they executed the Will and I find that the deceased's Will is a valid Will.

Whether the Will was skewed in favour of the first house:

There is no dispute that the deceased was a polygamous man, with three wives.

By the time of his death, the 3rd wife had died; however, the 1st and 2nd wives were alive. As per the evidence on record, by then, the 2nd wife was blind but the 1st wife was alive and was the one caring for and cooking for the deceased who was about 92 years old and unable to walk due to illness.

There is no dispute that the deceased had 10 sons, 3 from the first house, 2 from the 2nd house and 5 from the 3rd house. It is also admitted generally that about 2007, the deceased hived off 100 acres from his 206 acres of land in Kinangop and distributed 10 acres to each son. What the deceased distributed in the Will was the balance of about 106 acres and other properties.

Under Section 5 of the Act, every Kenyan was unfettered testamentary freedom to dispose of his or her property by will as he/she deems fit to do. However, like all rights, the same must be exercised with responsibility and a testator must bear in mind that in exercising the right and freedom, he should not injure or hurt those he was responsible for during his lifetime.

Section 29 of the Act provides who the dependants are:

“Section 29 for purposes of this part, dependant means;-

(c) Wife, or wives, or former wife or wives, and the children of the deceased whether or not mentioned by the deceased immediately prior to his death.”

Both the petitioners, objectors and others named in the list of beneficiaries are sons/daughters of the deceased.

In the Will, the petitioners Evanson Wagako and Samuel Kiaduma were appointed executors of the Will as required by Section 6 of the Law of Succession Act. They cannot be replaced unless the Will is declared invalid. The court having found the Will to be valid, they remain executors.

Under Section 26 of Laws of Succession Act, the court may be called upon to intervene if the deceased fails to make provision for some of his dependants. Section 26 of the Laws of Succession Act said **“.....the court may, if it is of the opinion that the disposition of the deceased's estate effected by his will, or by gift in contemplation of death, or the law relating to intestacy, or the combination of the will, gift and law, is not such as to make reasonable provision for that dependant, order that such reasonable provision as the court thinks fit shall be made for that dependant out of the deceased's net estate.”**

Section 28 of the Law of Succession Act guides the court on whether it can make an order under this part and what kind. The section provides as follows:

“In considering whether any order should be made under this Part, and if so what order, the court shall have regard to—

- (a) The nature and amount of the deceased's property;**
- (b) Any past, present or future capital or income from any source of the dependant;**
- (c) The existing and future means and needs of the dependant;**
- (d) Whether the deceased had made any advancement or other gift to the dependant during his lifetime;**
- (e) The conduct of the dependant in relation to the deceased;**
- (f) The situation and circumstances of the deceased's other dependants and the beneficiaries under any will;**
- (g) The general circumstances of the case, including, so far as can be ascertained, the testator's reasons for not making provision for the dependant.”**

Section 26 must be read with Section 28 of the Act.

Section 42 of the Laws of Succession Act also echoes Section 28 of the Act in that any property or gift given to a beneficiary of the deceased during the deceased's lifetime must be taken into account during distribution of the estate.

According to the objector (DW1), 64% of the deceased's property was bequeathed to the 1st house, 8% to 2nd house and 28% to 3rd house which according to them is unfair and favours the 1st house.

It is therefore necessary to relook at the said distribution.

I must reiterate what is not in dispute, that during his lifetime, the deceased had distributed 100 acres to the ten sons. The three sons of the 1st house got 30 acres in total, the two sons of the second house got 20 acres and the 3rd house, with five sons got 50 acres. That must be taken into account during distribution of the estate.

PW3 and DW1 admitted in evidence that the deceased's sons have taken possession of the deceased's estate in accordance with the Will. They further admitted that though no acreage is mentioned in the Will, there is demarcation of the land on the ground using barbed wire and a river. It means that even though the Will did not specify the acreage and boundaries, the beneficiaries know exactly the extent of each person's entitlement.

PW3 said that the Will is clear and they know what is meant by 'Ruare' – untitled land. That evidence was not controverted.

The Will provided a portion of land for each household at clause 4 – that is Nyandarua/Muumi/590 (Ruare) which measures 25.068 Ha (61.944 acres) to:-

James Ndungu - 3rd house,

Charles Mugera – 1st house

Isabella Muchemi – 1st house

Samuel Kianduma – 1st house

The rest of plot 590 was shared amongst the three houses with the 3rd house getting the flat land, 1st house the middle section and second house to the right side of Isabella. I observe that though the objectors admitted that each party is settled in their portion as per the Will, they never bothered to disclose what each person got in terms of acreage, for the court to determine whether the first house was favoured as alleged. The portions allocated to each house is of course subject to distribution amongst all the members of that particular house which includes the daughters of the deceased unless they renounce their interest.

The distribution of the commercial plots amongst houses has also raised contention. The deceased had 6 commercial plots. The first house was allocated Nduony Njeru 917 (Samuel Kianduma) and Charels Mugera, while Evanson Wagako got Plot 916. The objectors alleged that the 1st house earns Kshs.60,000/= per month from the said plot but were unable to avail any evidence in support thereof. This is despite the fact that the court ordered that the rents from the estate be deposited in one account to await determination of this suit. It would not be hard to know what each plot brings in per month.

The 2nd house was given one commercial plot No.270 which is co-owned by another person and only earned Kshs.6,000/= per month. Again no evidence was adduced by the objectors to show what is actually earned per month. The other complaint is that the 3rd house was bequeathed 3 commercial plots, that is, Plot 170 which is dilapidated and does not bring in any rent; that Plot 249 only earns Kshs.6,000/= per month and market stalls only earn Kshs.9,000/= per month.

In addition, the lease of the plots allocated to the 2nd and 3rd houses have expired while those for the 1st house are on freehold. There was no evidence availed by objectors as what each plot earned nor was there evidence of the status of the leases. The objectors have alleged and it behoves them to prove as required by Section 107 of Evidence Act.

Amongst all the deceased's daughters, only Isabella Wairimu and Beatrice Wanjiru of the first house were provided for in the Will. PW3 told the court that the two are un-married. That evidence was not controverted. The objectors did not demonstrate that the daughters of the other houses were un-married yet not provided for.

The deceased's daughters have not complained about being disinherited, but in any event, there is land reserved for each house under Plot 590 from which the daughters can benefit.

The other complaint is that though the 2nd wife was alive and blind at the time of the deceased's demise, the deceased left the money in the bank to the 1st wife, shares in the Limited Liability Company and the ancestral land in Nyeri – 4½ acres. As for the money in the bank, the court has no idea how much was left in the bank and whether it was worth sharing. The same to shares, the value was not disclosed. As to favouring the 1st wife, DW1 admitted that the 1st wife was very close to the deceased by the time of his death, caring for him and cooking for him. Similarly, the petitioners who are from the 1st house were very close to the deceased and Evanson Wagako drove the deceased around.

As earlier stated, Section 28 of the Law of Succession Act allows the court to consider various factors in such an application *inter alia* the relationship between the deceased and those contesting his Will.

The court was told that the Will had not provided for two sons of the 3rd house, namely, Stephen Thuo and David Wagako. However, DW1 confirmed that the two had each got 10 acres of land when land was distributed to the sons in 2007. Further, the two had a very strained relationship with the deceased so that the deceased had sued them or they had a criminal case in Nyahururu Court after they threatened or assaulted the deceased. That must be the reason why the deceased did not consider to gift them with more land. However, they will still benefit from the land given to the 3rd house. They have not been disinherited.

As to favouring the 1st house, it seems apparent that the deceased favoured the 1st house but it may be because of his relationship with the 1st wife who cared for him towards the end of his life, the 1st petitioner who related well with him and no wonder he left the vehicle with PW3 who ordinarily drove him around. In the case of *Elizabeth Kananu Ndolo v George Matata C.A.128/1995* the Court of Appeal considered a situation where some dependants claimed to have been disinherited by a Will.

***“So that if a man by his will disinherits his wife who was dependant on him during his lifetime, the court will interfere with his freedom to dispose of his property by making reasonable provision for the disinherited wife. Or if a man at the point of his death gives to his mistress the family’s only home and makes o reasonable provision for his children who were dependent on him during his lifetime, the court may well follow the mistress, under Section 26, and make reasonable provision for the dependent children out of the house given to the mistress. So that though a man may have unfettered freedom to dispose of his property by will as he sees fit, we do not think it is possible for a man in Kenya to leave all his property for the maintenance and up-keep of an animal orphanage if the effect of doing so would be to leave his dependants unprovided for.*”**

.....We must, however, take into account the undoubted fact that the appellant herein was the deceased’s preferred wife and we can only do so by allocating to her house a larger share of the deceased’s net estate..”

A reading of the above decision, it is clear that though a deceased may favour some of his beneficiaries but the court would intervene if the beneficiaries were disinherited or if the distribution is unreasonable and unfair.

In this case, the 1st house seems to have been the preferred one. I cannot however conclude that the other houses or dependants were not provided for. The only problem is that the objectors failed to value the properties of the estate for the court to appreciate whether or how the 1st house had been favoured as opposed to the other two. The court cannot act out of imagination and speculation. It is trite that he who alleges must prove and the objectors have failed to do that. The deceased may have favoured the 1st house because of his relationship with them. The distribution also seems to have been based on the size of the household. The 2nd house seems to have received less because they were very few, only four (4). The objectors have not demonstrated that the distribution was unreasonable.

DW1 also stated that the Will omitted one of deceased’s property, that is, *No.Nyandarua/Mumui/136* which was owned by the deceased as indicated in the annexed search certificate. However, at the hearing, there was no suggestion as to whom it should devolve to

In conclusion, having considered the evidence on record, I find that the deceased left a valid Will, and there are no valid grounds for revoking the grant issued to the petitioners. I hereby dismiss the objectors’ application seeking revocation of the grant.

I will issue the final orders as follows:

- (1) The deceased’s Will dated 31/12/2011 is a valid Will;***
- (2) All the deceased’s beneficiaries have been provided for in the Will or during the deceased’s lifetime;***
- (3) The summons for revocation dated 11/12/2012 is without merit and is hereby dismissed;***
- (4) The petition by way of cross petition dated 15/8/2013 is hereby dismissed;***
- (5) If Nyandarua/Mumui/136 has not been distributed, the parties are at liberty to agree on its distribution failing which they should file affidavits for the court to consider;***
- (6) The executors of the Will to file for confirmation of grant of Probate of Written Will;***
- (7) Each party to bear its own costs.***

Dated, Signed and Delivered at NYAHURURU this 26th day of September, 2019.

R.P.V. Wendoh

JUDGE

PRESENT

Ms. Chelule holding brief for Mr. Murimi for petitioner

Soi – Court Assistant